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No. 95-961

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

ED K. McDANIEL, Warden, Ely State Prison,
FRANKIE SUE DEL PAPA, Attorney
General of the State of Nevada,

Petitioners,

v.

PATRICK CHARLES McKENNA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ISSUES PRESENTED

1. In seeking review of a decision of the Court of Appeals, unanimously affirming a grant of habeas corpus relief, may a state raise issues regarding the prejudicial effect of constitutional error, allegedly justifying this Court's exercise of its discretionary certiorari jurisdiction, when it has never presented those issues to the Court of Appeals, either in briefing on the merits or in a petition for rehearing, and when the position it asserts in this Court is inconsistent with the position it asserted in the Court of Appeals.

2. Is this case an appropriate vehicle for resolving asserted conflicts in the decisions of the Court of Appeals, when the issues asserted were not raised below and the issues themselves are complex, when the apparent conflict is undeveloped because the various decisions involved have not analyzed the dispositive precedents of this Court.

3. Should this Court overrule Parker v. Dugger, 498 U.S. 308, 112 S.Ct. __ (1991), and rule that a jury finding that there are "no mitigation circumstances sufficient to outweigh the aggravating factors" can rationally be interpreted as a factual finding that there are no mitigating circumstances at all, when the jury was given no verdict form allowing it to specify the existence of mitigating circumstances unless the mitigating circumstances outweighed the aggravating circumstances,

when evidence of mitigating circumstances was presented to the jury, and when the state appellate court relied on the jury's verdict in concluding that there were no mitigating circumstances.

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Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Introduction

Respondent accepts the accuracy of the petition for certiorari with respect to the opinions below, the jurisdiction of this court, and the statement of the case. Pet. at 2-3. There are no parties to the case other than those named in the caption.

In this brief in opposition to the petition for writ of certiorari, respondent McKenna will refer collectively to the petitioners (the Warden of the Nevada State Prison at Ely and the Attorney General of Nevada) as the state.

I. The Two Major Issues Presented in the Petition for Writ of Certiorari are not Properly before this Court because they were not raised in the Court of Appeals

The Court of Appeals in this case properly held that the

unnarrowed "depravity of mind" aggravating circumstance was unconstitutionally vague, Pet. App. A-18-19, and the state does not challenge this conclusion. The Court of Appeals recognized that Nevada is a "weighing" jurisdiction. The invalidity of the depravity aggravating factor despite the presence of a single other aggravating circumstance, therefore, required the state in the first instance to address what proceedings - - either reweighing or harmless error analysis - - should be undertaken to ensure that the defendant received the individualized sentencing determination the constitution demands. See Stringer v. Black, __ U.S. __, 112 S.Ct. 1130, 1136 (1992).

The state in its petition asserts that certiorari should be granted because the Court of Appeals "refused to conduct a harmless error review pursuant to the harmless error analysis announced in Brecht v. Abrahamson," Pet. at 7 (emphasis added), and that the Court of Appeals "rejected the State's ... contention that the circuit court could and should perform a harmless error analysis." Pet at 15. The state's argument is based on a mischaracterization of the record: the state criticizes Circuit Judges Hug, Hall and Trott for "refusing" to conduct a harmless error analysis for which the state never asked. The issues raised by the state's petition were not raised below, and a "question presented in the petition but not raised in the Court of Appeals is not properly before [this court]." Delta Airlines v. August, 456 U.S. 346, 362

(1981); accord, Youakim v. Miller, 425 U.S. 231, 234 (1976) (per curiam) (court "does not decide questions not raised or involved in the lower court"). The state has made no attempt to demonstrate that this is "one of the exceptional cases," Adickes v. Kress & Co., 398 U.S. 144, 147 n.2 (1970), in which the failure to litigate the issues presented below should not be considered a waiver.

Here, the state never contended in the Court of Appeals that the court was obligated to conduct a harmless error analysis following the invalidation of an aggravating factor in a weighing jurisdiction or that it could not permit the state courts to address that question in the first instance. This Court therefore does not have the benefit of any analysis or resolution of the issue by the court below. Similarly, the state never presented argument in the Court of Appeals as to whether any harmless error analysis of this question should be conducted under Brecht v. Abrahamson, __ U.S. __, 113 S.Ct. 1710 (1993), rather than Chapman v. California, 386 U.S. 18 (1967). Again, this Court is without the benefit of any analysis or resolution of the issue by the court below. Since these questions are complex, see Part II, below, this Court should apply its normal rule and decline to grant certiorari on the basis of the issues not raised below.

Further, assuming arguendo that the Court of Appeals erred in any respect in its decision, the state's failure to raise the issues in the briefing below was compounded by the

state's failure to seek rehearing or rehearing en banc in order to allow the Court of Appeals to address the issues it presents in its petition for certiorari. It is simply not credible to assume that the state was surprised by the Court of Appeals' failure to conduct harmless error analysis under Brecht: the state itself cited Brecht with regard to other errors at issue in the case, but it never suggested that the Court of Appeals should conduct Brecht analysis with respect to the unconstitutional aggravating circumstance. Respondents/Appellants/Cross-Appellees' Joint Answering and Reply Brief at 2-8, 19, 28, 30. But even assuming that the state was surprised by the decision of the Court of Appeals, and thus that a petition for rehearing was its first opportunity to raise the issue, see, e.g., Brinkerhoff-Faris Trust Co v. Hill, 281 U.S. 676, 677-678 (1930), it did not seek rehearing and thus gave the panel no opportunity to address the issue. Similarly, the state cites a number of cases which suggest confusion as to the procedure for determining the effect of constitutional error and the standard of review to be applied. Petition at 15-21, citing Smith v. Dixon, 14 F.3d 956 (4th Cir. 1994) (en banc); Wiley v. Puckett, 969 F.2d 86, 94 n.8 (5th Cir. 1992); Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994); Orndorff v. Lockhart, 998 F.2d 1426, 1430 (8th Cir. 1993). Not one of these cases was ever cited to the Court of Appeals; and the state gave neither the panel of the Court of Appeals nor the en banc

court the opportunity to analyze any of these decisions, because it did not seek rehearing to correct any perceived error in the Court Appeals' decision or to harmonize its decision with apparently inconsistent authorities. The state has simply sandbagged Respondent, as well as Judges Hug, Hall and Trott, by raising these issues for the first time on certiorari. This Court should recognize that the issues presented are not properly before this Court and deny certiorari.

The state's attack on the Court of Appeals for "refusing" to conduct a harmless error analysis which the state did not request is particularly misdirected because the state had the primary obligation to establish that the constitutional error involved here was harmless. This Court has explicitly held that review of constitutional errors on habeas corpus under any standard "plac[es] the risk of doubt on the State." O'Neal v. McAninch, __ U.S. __, 115 S.Ct. 992, 996 (1995); id. (standard of review in habeas corpus proceedings "places the burden on prosecutors to explain why [constitutional] errors were harmless," quoting Brecht v. Abrahamson, 507 U.S. at __, 113 S.Ct. at 1723 (Stevens, J., concurring)); see also id. at 995, citing Chapman v. California, 386 U.S. 18, 24 (1967). The state did not attempt to analyze harmless error based upon review of the entire record; indeed, as shown below, it argued affirmatively that the state should conduct such an analysis in the first instance.

The state's argument that the Court of Appeals was obligated to conduct a harmless error analysis is also inconsistent with the position taken by the state below. In the Court of Appeals, the state repeatedly and consistently argued that, as a matter of comity, the state courts should be given the opportunity to decide how a resentencing should be conducted. The state explicitly argued that "in the interests of comity ... the lower court should have certified certain questions to the Nevada Supreme Court of the present status of Nevada law [on reweighing] or harmless error analysis." Respondents/Appellants/Cross-Appellees' Opening Brief at 23-24. The state cited its own concession in the district court that the court should "send [the case] to the Nevada Supreme Court for decision on that issue." Id. at 24. The state exhorted the Court of Appeals to "afford the Nevada Supreme Court the opportunity to resolve the question [of reweighing or harmless error]", id. at 25. Again the state argued that the Court of Appeals "should, as a matter of comity, certify" the questions of reweighing or harmless error to the Nevada Supreme Court. Respondents/Appellants/Cross-Appellees Joint Answering and Reply Brief at 7. Although the Court of Appeals did not follow the suggested certification procedure, its decision affirming the granting of the conditional writ furthers the respect for comity which the state asserted: the court's decision allows the state court system to determine, in the first instance, what form any resentencing proceeding

should take. Since the state argued consistently in the Court of Appeals that the state courts should be afforded the first opportunity to address the issue of reweighing or harmlessness, it should not be heard to complain in this Court that the Court of Appeals erred in giving the state courts that opportunity: this "is precisely the kind of bait-and-switch strategy that waiver rules, prudential or otherwise, are supposed to protect against." Lebron v. National R.R. Passenger Corp., __ U.S. __, 115 S.Ct. 961, 978 (1995) (O'Connor, J., dissenting); see Steagald v. United States, 451 U.S. 204, 211 (1981) (position taken by government in litigation below prevented reliance on inconsistent position in Supreme Court). Accordingly, the state's failure to advance in the Court of Appeals the issues it raises in the petition for certiorari, and its adoption of a position in the petition for certiorari which is inconsistent with the one adopted in the court below, must result in the conclusion that the issues presented in the petition for certiorari are not properly before this Court.

The sole reference by the state to harmless error analysis in the Court of Appeals was its narrow contention that the death sentence could be upheld solely on the supposition that there were no mitigating circumstances at all: therefore the court could automatically find that any error was harmless beyond a reasonable doubt because there were no mitigating circumstances and "it would be legally

impossible for the remaining [valid] aggravating circumstances to be outweighed." Respondents/Appellants/Cross-Appellees' Opening Brief at 25, 29. The Court of Appeals correctly rejected this argument because it is based on a false premise: there is no finding that mitigating circumstances are not present. Pet. App. A-20; see Part III below.[1] The Court of Appeals thus properly disposed of the only harmless error argument advanced by the state; the state never raised, and the Court of Appeals never decided, the much broader issues relating to harmless error review which are advanced in the petition for certiorari. This Court should reject the state's belated attempt to raise issues far broader than those it raised in the courts below, and it should deny certiorari on the ground that these issues are not properly before it.

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[1] The Court of Appeals' rejection of this contention is sustainable on an additional ground. The state's theory is that the absence of mitigating circumstances can result in automatic validation of a death sentence when there are valid remaining aggravating factors. This theory is based on capital punishment schemes, such as Arizona's, in which a sentencer is required to impose a death sentence if it finds that aggravating circumstances are present and no mitigating circumstances are present. See Jeffers v. Lewis, 974 F.2d 1075, __ (9th Cir. 1992). The Nevada statutory scheme was inaccurately characterized as being of this type in Neuschafer v. Whitley, 816 F.2d 1390, 1393 (9th Cir. 1987). In fact, under Nevada law the sentencer is never required to impose a death sentence, even when the aggravating circumstances outweigh the mitigating circumstances or when there are no mitigating circumstances at all. The Nevada Supreme Court has explicitly rejected the position that the Nevada scheme is comparable to systems like Arizona's. Bennett v. State, 106 Nev. 135, 144-145, 787 P.2d 797 (1990). Thus even a total absence of mitigating factors could not result in automatic affirmance of a death sentence when aggravating circumstances are present.

II. This Case is not an Appropriate Vehicle for Resolving the Issues Raised in the Petition for Certiorari

The fact that the issues presented in the petition for certiorari were not raised or litigated in the Court of Appeals makes this case an intrinsically inappropriate vehicle for resolving the questions raised by the state. Because of the failure to litigate the issues below, this Court is being required to assess the propriety of review on the drastically limited basis of a certiorari petition and a short opposition, which must attempt to substitute for full litigation and resolution of these issues in the Court of Appeals. It is unfair to this Court, and to the litigants, to attempt to present adequate discussion of these issues in this context.

On the merits, the conflicts asserted by the state as a justification for granting certiorari are not sufficiently substantial to require review. In this case, the Court of Appeals properly found that an invalid aggravating circumstance infected the sentencing decision in a weighing state. The court then followed this Court's own precedents and left to the state court system how the defendant would be resentenced. Pet. App. A-20.

In the leading case on the effect of invalid aggravating circumstances in weighing state, Justice Kennedy's opinion for the Court prescribed precisely what the Court of Appeals did in this case:

> ....use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence

> and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system.

Stringer v. Black, __ U.S. __, 112 S.Ct. 1130, 1140 (1992) (emphasis added); accord, Richmond v. Lewis, __ U.S. __, 113 S.Ct. 528, 535 (1992) ("where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentencing is to stand.") Nothing in this Court's decision in these cases, or in Brecht v. Abrahamson, suggest that federal courts can perform that "new sentencing calculus" in the first instance. The state cites cases suggesting conflict among the circuits as to whether the federal court should conduct a harmless error analysis itself rather than leaving the "new sentencing calculus" initially to the state. Pet. at 15-18. Remarkably, not one of these cases analyses, discusses, or even acknowledges the controlling language from Stringer or Richmond.[2]

This Court has treated the error arising from invalid aggravating factors as sui generis. In non-weighing states, it has allowed a rule of essentially automatic affirmance when valid aggravating factors are present, Zant v. Stephens, 462 U.S. 862 (1983), unless the error involved in the invalid

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[2] Nor do any of these cases assess the effect, if any, of O'Neal v. McAninch, __ U.S. __, 115 S.Ct. 992 (1995), in which this Court held that the state continues to bear the risk of doubt as to the effect of constitutional error.

aggravating factor otherwise affects the sentencing proceeding. Tuggle v. Netherland, __ U.S.__, 116 S.Ct. 283 (1995) (per curiam). In weighing states, by contrast, this Court in Stringer and Richmond has essentially recognized that the weighing of an invalid aggravating factor intrinsically skews the sentencing calculus, and thus requires the state system to reassess the sentence. In the weighing context, federal review of an invalid aggravating factor is less like review of a trial error subject to Brecht analysis and more like a structural error, because the weighing of an invalid factor necessarily compromises the integrity of the sentencing calculus which only the state sentencing system can undertake. These questions have not been developed in this case (because the issues was not raised below) or in the other cases cited by the state, and thus any apparent conflict in the cases is too undeveloped to justify review on certiorari. This case, in which the Court of Appeals followed the prescriptions in this Court's own cases, is a particularly inappropriate vehicle for resolving an insufficiently developed conflict.

This case is also an inappropriate vehicle for assessing questions of federal harmless error review because the Nevada statutory scheme involved is an idiosyncratic one which greatly complicates any assessment of the desirability of harmless error analysis. Nevada is a weighing state, but the result of the weighing calculus does not necessarily dictate the sentence.

> Nevada's statute does not require the jury to impose the death penalty under any circumstance, even when the aggravating circumstances outweigh the mitigating circumstances. Nor is the defendant required to establish any mitigating circumstances in order to be sentenced to less than death.

Bennett v. State, 106 Nev. at 144-145 (footnote omitted).

In this context, requiring a federal court to conduct harmless error analysis would require an extremely difficult assessment of whether an invalid aggravating factor could have had any effect on a jury which has the absolute discretion to decline to impose the death penalty under any circumstances. An invalid aggravating factor which may have a minimal effect in a weighing process could always influence a juror in the exercise of his or her standardless and untrammeled power to decline to impose the death penalty. Thus the character of any harmlessness analysis is particularly difficult under the Nevada statute; and the considerations which this Court may find relevant to whether harmless error review should be required in the context of this type of statute will be different from the consideration involved in states with standard weighing schemes. Thus this case is not an appropriate vehicle for resolving the broad issue of the desirability of requiring harmless error analysis in the large number of states with different weighing schemes.

The state also argues that the federal courts should conduct harmless error analysis because the state court system may not be able to conduct reweighing analysis under Clemons v. Mississippi, 494 U.S. 738 (1990). Pet. at 22, 15 n.4.

Respondent submits that the possible availability of the particular forms of resentencing under state law is not a relevant consideration in determining whether the federal courts are required to conduct harmless error analysis before allowing the state system the opportunity to address the issue. How the state system chooses to structure its resentencing proceedings is a question of state practice; the federal courts cannot be required to pretermit any state proceedings merely on the basis of a fear that a form of resentencing which the state finds most convenient or favorable may not be available under federal law.

The state and amici curiae argue that the federal court should be required to conduct harmless error analysis in the first instance in order to avoid delay and as a matter of comity. Pet. at 8, 22; Amici Curiae Br. at 7-8. This argument stands the principles of federalism and comity on their heads. The essence of these doctrines is that federal courts will not prematurely resolve federal constitutional questions. To the contrary, state courts have the initial responsibility for vindicating federal rights in state criminal proceedings. E.g., Engle v. Isaac, 456 U.S. 107, 128 (1982). This Court cannot assume that the state courts will disregard this duty and reflexively re-impose death sentences which should not survive reweighing or harmless error analysis: such an assumption would be directly contrary to every principle of comity to which this Court has consistently

adhered.[3] The assumption behind this argument is that state courts will always re-impose death sentences (whether they ought to do so or not) and federal courts will "inevitably" have to conduct a harmless error analysis. This assumption is wholly unjustified, as it would be in any context - - such as the exhaustion doctrine - - in which federal courts are required to allow state courts to rule on constitutional issues and only then to conduct their own review of the state courts' actions. The state's assertion that this delay can only be pointless assumes that the system cannot work properly.[4] This is an assumption that this Court has never countenanced.

Finally, amici curiae argue that the federal courts should be compelled to conduct harmless analysis in order to avoid political embarrassment to state courts. Amici Curiae Br. at 10. The impropriety of this suggestions is staggering: a decision to mandate a certain type of review in order to accommodate the political desires of the state system would in itself violate standards of judicial conduct. American Bar Association, Code of Judicial Conduct, Canon 3(A)(1)

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[3] "The principle of comity that underlies the exhaustion doctrine would be ill served by a rule that allowed a federal ... court 'to upset a state court conviction without an opportunity to the state to correct a constitutional violation,' Darr v. Burford, 339 U.S. 200, 204 (1950)." Murray v. Carrier, 477 U.S. 478, 489 (1986).

[4] To the extent that the state may believe that evidence exists to support its contentions on this point, it has never proffered it because it did not litigate the question below, and thus the record is inadequate to allow rational review of the point.

(prohibiting considerations of "partisan interests, public clamor, or fear of criticism" in decisionmaking). Respondent submits that this Court should disregard this improper argument in its entirety.

This case is also an inappropriate vehicle for deciding whether harmless error review, if it is required, should be conducted under the standard of Chapman v. California, 386 U.S. 18 (1967), or Brecht v. Abrahamson, __ U.S. __, 113 S.Ct. 1710 (1993). As noted above, the state never raised this issue at any stage of the proceedings and in fact the only reference the state made to harmless error review with respect to an invalid aggravating factor invoked the Chapman standard. Respondents/Appellants/Cross-Appellees' Opening Brief at 26. Thus the state cannot maintain that application of the Brecht standard is, or ever has been, in issue in this case. See Steagald v. United States, 451 U.S. 204, 211 (1981). Under these circumstances, the state cannot legitimately contend that the Court of Appeals' decision is in conflict with the decisions of other court of appeals, cf. Sup. Ct. Rule 10.1(a), since the Court of Appeals was never asked to address that issue and it did not do so. It is a significant issue whether a defendant can be prevented from ever having a constitutional error in his or her case reviewed under the Chapman standard, simply because the state courts refused to recognize the existence of the error. The resolution of that question should be reserved for a case in which it is actually

presented.

As shown above, the considerations advanced as grounds for requiring federal courts to conduct harmless error analysis based on invalid aggravating factors present complex issues. Since there has never been any litigation of these issues in any of the courts below, this case is an inappropriate one for resolving them in the first instance.

III. The State's Assertion that there is no Mitigating Evidence in the Record does not form a basis for Certiorari Review because this Court disposed of an Indistinguishable Claim in Parker v. Dugger

The Court of Appeals properly found that a verdict form reciting that the jury states "that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances," Pet. App. C-2, does not mean that no mitigating circumstances at all were found to exist. Pet. App. A-20. Normally, it would be a sufficient response to the state's petition to point out that this Court has adopted the same position in a virtually identical case, Parker v. Dugger, 498 U.S. 318 (1991), and there is no basis for revisiting the issue. See Sup. Ct. Rule 10.1(a,c). The state, however, seeks to couch this issue as a failure by the Court of Appeals to respect the presumption of correctness accorded to state factfindings under 28 U.S.C. § 2254 (d). The state's argument is based upon an irrational characterization of the record, which must be clarified.

The Court of Appeals correctly recognized that evidence of mitigating circumstances was presented to the sentencing

jury, Pet. App. A-20, as did the Nevada Supreme Court on direct appeal. Pet. App. D-14-15. In returning its sentencing verdict, the jury endorsed a standard verdict form specifying the aggravating circumstances found and reciting, "We the Jury, state that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances . ..." Pet. App. C-2. The jury was not presented with any verdict form both allowing it to find that aggravation outweighed mitigation and specifying mitigating factors. This situation is indistinguishable from Parker v. Dugger. There, the Florida sentencing judge found that there were "no mitigating circumstances that outweigh the aggravating circumstances." 498 U.S. at 314. Given the fact that mitigating evidence was presented, and the trial judge was under no obligation to specify non-statutory mitigating circumstances, id. at 737, this Court found that the trial court's order did not mean that there were no mitigating circumstances at all, but only that the mitigating circumstances did not outweigh the aggravating ones. This Court thus found that the Florida Supreme Court's interpretation of the trial court's order, as meaning that there were no mitigating circumstances at all, was arbitrary and not entitled to a presumption of correctness because it was not supported by the record. Id. at 320; 28 U.S.C. § 2254 (d)(8). The situation presented here is exactly the same.

The state contends, however, that the sentencing jury did

implicitly find that there were no mitigating circumstances because it did not fill out a special verdict form specifying mitigating factors. Pet. App. M-1-2. The state does not discuss the fact that this special verdict form explicitly recited "[W]e, the Jury ... designate that the mitigating circumstance or circumstances which have been checked below outweigh any aggravating circumstance or circumstances." Pet. App. M-1. The state does not explain why a jury which was returning a verdict finding that aggravation outweighs mitigation would also be expected to specify mitigating factors on a verdict form reciting exactly the opposite finding, that mitigation outweighs aggravation. The state's position on this point is irrational to the point of absurdity.

The state also suggests that the Nevada Supreme Court's interpretation of the sentencing verdict implies an independent factual finding that there were no mitigating circumstances. The language of the Court's opinion belies this contention: the Nevada Supreme Court's decision explicitly states that "[T]he jury ... found there were no mitigating circumstances", Pet. App. D-19; see also D-17 n.12 ("the jury found no factors mitigating against imposition of the death penalty.") Thus, just as in Parker, the Nevada Supreme Court's conclusion was not based on any independent evaluation, but simply on its mischaracterization of the jury's verdict. Parker v. Dugger, supra, 498 U.S. at 319-320.

Accordingly, Parker has resolved this question and there is no justification for review on certiorari.

Finally, even assuming arguendo that the state court findings could be considered as establishing an absence of mitigating factors, this would not affect any dispositive issue. As shown above, page 8 n.1, under Nevada law, a defendant need not establish any mitigating circumstance to obtain a sentence less than death, and the jury is never required to impose a death sentence no matter how much aggravation outweighs mitigation, and even in the absence of any mitigation. Bennett v. State, supra, 106 Nev. at 144-145. Accordingly, even a conclusion that there are no mitigating circumstances at all would not invalidate the decision of the Court of Appeals, and review on certiorari is not justified.

IV. Conclusion

For the reasons stated above, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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